REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Misc Application 974 of 2005

KAMUNYORI & COMPANY ADVOCATES…..
…….APPLICANT

VERSUS

CANNON ASSURANCE (K) LIMITED…….
…….RESPONDENT

R U L I N G

This is an application by way of a Notice of Motion which is stated to be pursuant to the provisions of Section 51 (2) of the Advocates Act; Rule 3 of the Advocates (Remuneration) Order; and Sections 3 and 3A of the Civil Procedure Act. The application arose from the taxation of an Advocate/Client Bill of Costs.

The client, who is the applicant, seeks to set aside the Certificate of Taxation dated 21st December 2005. It is their contention that they deserve a hearing on the Bill of Costs dated 8th December 2005.

It is the client's case that there had been an agreement with their advocates, (who are the respondents herein) that the fee in question would be in the sum of KShs. 87,500/=. Following the alleged agreement, the client remitted payment to the advocates.

Therefore, as far as the client was concerned, the decision by their advocates to file and prosecute the taxation of their Bill of Costs was a breach of the agreement on fees.

It is common ground that the advocates had been instructed to recover money on a mortgage account of one Hon. Fred Gumo. It is also common ground that after the advocate had issued a Notice of demand, the client decided to discontinue action against Hon. Gumo.

Thereafter, the client did hold some discussions with their advocates. However, the two parties are not in agreement as to the results of the discussions. On the one hand, the client holds the view that their advocates agreed to accept the sum of KShs. 87,500/= in settlement of their fees; whilst on the other hand, the advocates insist that even though they accepted the payment of KShs.87,500/=, at no time did they say that that was in full settlement of their fees. As far as the advocates are concerned, they had at all material times, reserved their right to tax their Advocate/Client Bill of Costs.

This court is now called upon to determine two issues, in my understanding. First, I have to determine whether or not the statutory provisions cited by the client are available to them, in the

circumstances of this case. Secondly, if I should determine that issue, in favour of the client, I would then need to determine if the client had made out a case to warrant the setting aside of the certificate of taxation.

On the first issue, the advocates have submitted that the application before me is incompetent as Section 51 (2) of the Advocates Act does not empower the court to set aside a certificate of taxation.

Similarly, Rule 3 of the Advocates Remuneration Order, and Section 3 and 3A of the Civil Procedure Act are all said to fall short of empowering the court to set aside a certificate of taxation. In that regard, the advocates submitted that the court's inherent jurisdiction may only be invoked when there were no specific provisions set out for achieving the desired goals.

To my mind, the wordings of Section 3 and 3A of the Civil Procedure Act speak for themselves. Section 3 provides as follows:

"**3. In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force."**

Clearly, that section recognises the special jurisdiction or power, as well as the special form or procedure that may be prescribed by or under any other laws which were in force. Where such special provisions were in force, the Civil Procedure Act would not limit or otherwise affect the same, unless there was specific provision to the contrary.

And Section 3A of the Civil Procedure Act reads as follows:

"**3A. Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process."**

In the case of **RYAN INVESTMENTS LTD & ANOTHER V THE UNITED STATES OF AMERICA [1970] EA 675**, at 677, the Court of Appeal expressed itself thus:

"**In the case now under consideration, the judge found that the summonses were defective and impossible to obey. In the absence of specific**

legislative provision, I consider that he should have set aside the summonses in the exercise of his inherent jurisdiction. Strictly speaking, the judge was correct in saying that no application can be made under S. 97 of the Civil Procedure Act, as it does not create jurisdiction but merely makes it clear that the inherent powers of the court are not affected by the enactment of the Act. It was apparent that the application in fact invoked the exercise of the court's inherent powers. Such an application can be made if no other remedy is available, and a remedy should be provided if the interests of justice so require."

A perusal of the Civil Procedure Act reveals that the current Section 3A was originally Section 97, which is referred to in the decision above-cited. Therefore, the advocates are right in saying that the client herein could only invoke the provisions of Section 3A of the Civil Procedure Act, if no other remedy was available.

However, I believe that if an applicant has invoked the relevant statutory provisions, there would be no bar to his also citing the provisions of Section 3A of the Civil Procedure Act. Strictly speaking, such an applicant would not be moving the court pursuant to Section

3A. He would only be reminding the court about its inherent powers.

Of course, the court does not need to be reminded of its inherent powers in each and every application, because the court is always well aware of the same. Therefore, when appropriate provisions have been

invoked by an applicant, who then also cites Section 3A of the Civil Procedure Act, such citation is superfluous, but not fatal to the application.

e would onlHe Now, in this case, the advocates contend that Section 51(2) of the Advocates Act is inapplicable to the circumstances of this case. It is their contention that the appropriate remedy is provided by paragraph 11 of the Advocates Remuneration Order.

On the other hand, the client feels that the said paragraph would only be applicable, if both parties had participated in the process of the taxation. The client says that it is only then that if one or the other party was dissatisfied with the ruling of the taxing officer, that he could invoke the provisions of paragraph 11.

In the case of **MACHIRA & CO. ADVOCATES V ARTHUR K. MAGUGU & ANOTHER, MISC APPLICATION NO. 358 of 2001** (At Milimani Commercial Courts), the Hon. A. G. Ringera J. (as he then was), had occasion to determine the issue about the validity of a reference which was filed pursuant to the provisions of Sections 44 and 51 of the Advocates Act. At page 9 – 10 of his ruling, the honourable judge held as follows:

"**As regards the validity of the client's reference, I take the following view of the matter. The invocation of both section 44 and 51 of the Advocates Act and paragraph 13(1) of the Advocates Remuneration Order is quite misplaced. None of those provisions confer on the client the power to make the reference. However, I am of the opinion that the invocation of wrong procedural provisions does not render an application incurably defective if it otherwise lies in law. In this case, the applicant also invoked paragraph 11 of the Remuneration Order which is pertinent to references from decisions on taxation. In the premises I find the reference is not incurably defective."**

I have recited the foregoing ruling at length, so as to bring out the exact reasons why the court held that although the client had invoked Section 51 of the Advocates Act, the reference was not

defective. The reason was that as the client had also invoked the provisions of paragraph 11 of the Remuneration Order, so, that reference did lie. That point was emphasized by the Hon. Ringera in the case of **MACHIRA & CO. ADVOCATES V ARTHUR K. MAGUGU & ANOTHER** (supra), when he said:

"**Secondly, as I understand the practice relating to taxation of bills of costs, any complaint about any decision of the taxing officer whether it relates to a point of law taken with regard to taxation or to a grievance about the taxation of any item in the Bill of Costs is ventilated by way of a reference to the Judge in accordance with paragraph 11 of the Advocates Remuneration Order."**

In the light of that legal position, the client cannot have been right to argue, as it did, that paragraph 11 of the Remuneration Order only applies in cases wherein both parties had participated in the taxation.

The client has thus failed to properly move the court. In the result, the application dated 23rd December 2005 is incompetent. Accordingly, it is struck out, with costs to the advocates.

In arriving at this decision, I have consciously not delved into the substance of the matters raised, in relation to whether or not there was a valid agreement between the parties, on the quantum of fees. I hold the view that the said matters do not call for adjudication, as the application itself is incompetent.

Dated and Delivered at Nairobi this 26th day of May 2006.

FRED A. OCHIENG

JUDGE